THOR BENG HUAT

v.

OOI EE GUAN & ANOR.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 22-49-1987]
16 OCTOBER 1989

CIVIL PROCEDURE: *Injunction - Application to discharge - Whether there were triable issues - Whether there was non disclosure of facts during ex parte application - Whether Court's jurisdiction is ousted - Section 18 Societies Act 1949.*

This is an application for the discharge of an *ex parte* interlocutory injunction made against the defendants in their representative capacity as Chairman and secretary of the Yee Chee Thor Seah Clan Association, Malaysia.

On 22 May 1986 an application had been purportedly made by the association to amend its name from "the Yee Chee Thor Clan Association Penang" to "Malaysia Yee Chee Thor Seah Clan Association". A meeting was convened between the representatives of the association and the Registrar of Societies and certain amendments were made, one of which was with regard to the name of the association, so as to read "Persekutuan Keturunan Yee Chee Thor Seah, Malaysia" ("The Yee Chee Thor Clan Association, Malaysia").

The plaintiff alleged that the defendants had fraudulently, mistakenly or otherwise submitted to the Registrar of Societies a wrongful record of the minutes of the general meeting of the defendants association. The defendants denied the allegations of fraud and referred to various events to show that the change of name had been strictly in accordance with the Societies Act 1949 and that there had been non-disclosure of material facts on the part of the plaintiff when applying for the *ex parte* order and that the balance of convenience favoured the defendants.

The defendants also contended that the plaintiff's remedies lay exclusively under s. 18 of the Societies Act, if they were dissatisfied with the Registrar and that the Court had no jurisdiction to decide upon the rights of persons to associate together when the association possesses no property.

Held:

[1] There are serious questions to be tried and that the preservation of the documents referred to therein is a necessary step in the interest of justice.

[2] On the alleged non-disclosure, where it has not been shown that the misrepresentation was of such a nature as to mislead the Court or if the truth was presented, the Court would probably have not granted the *ex parte* order, the application for discharge should be refused.

[3] The plaintiff owns 5 pieces of property, and if the intent and effect of the defendants exercise in changing the name of the association is to deprive certain members of their membership this will clearly involve property rights and, therefore, the jurisdiction of the Court is not ousted.

[4] Section 18(d) of the Societies Act 1949 speaks about an appeal lying against "the refusal to approve the change of name" and not an appeal from the decision of the Registrar approving the change of name which is what happened in the instant case. Objection by the defendants on this ground is therefore dismissed.

[Application dismissed with costs.]

Cases referred to:
Rigby v. Connol [1874-80] All ER Rep 592
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396
Professor A. Kahar Bador & Ors. v. N. Krishnan [1983] 1 MLJ 407
Re St James' Club [1852] 2 De GM & G 383
Harkness v. Bel's Asbestos and Engineering Ltd. [1967] 2 QB 729
Eu Finance Bhd. v. Lim Yoke Foo [1982] 2 MLJ 37

Legislation referred to:
Societies Act 1966, s. 18(d)

For the plaintiff - Lim Boo Chang; M/s. Lim Boo Chang & Co.
For the defendants - Yu Meng Queng; M/s. Tan, Yu & Co.

JUDGMENT

Edgar Joseph Jr J:

This was a defendants' application for discharge of an *ex parte* interlocutory injunction ("the *ex parte* order") made against them in their representative capacity as Chairman and secretary of the Yee Chee Thor Seah Clan Association, Malaysia, ("the association") upon the application of the plaintiff an ordinary member of the association.

The *ex parte* order directed as follows:

(a) the association, it's members, agents or servants or otherwise be restrained from holding any extraordinary general meeting for the purposes of changing or endorsing the change of name of the association until further order;

(b) the first and the second defendants do surrender the following documents to the Registrar of Societies, ("the Registrar") until further order, namely:

(i) minutes of all the meetings of the association;

(ii) a full record of the members of the association;

(iii) booklets of official receipts for membership subscriptions of the association;

(c) all members who joined the association after 16 February 1986, (i.e., the date of the last general meeting) be and are disqualified from voting

until determination of the suit herein or further order of the Court **and it is further ordered** that the costs of this application be costs in the cause **and it is lastly ordered** that there be liberty to apply.

The suit which gave rise to the application for the *ex parte* order was for the following reliefs:

(a) A declaration that:

(i) the change of name of the association to Yee Chee Thor Seah Clan Association, Malaysia is null and void and/or otherwise *ultra vires* it's Constitution;

(ii) the Registrar do change the name of the association back to it's original name i.e., "Yee Chee Thor Seah Clan Association, Penang," or alternatively, to the name that was adopted at the annual general meeting held on 16 February 1986 ("the AGM") namely, "Yee Chee Thor Seah Clan Association, Malaysia".

(b) An interlocutory injunction to restrain the association, it's members, agents or servants or otherwise from holding any emergency general meeting for the purpose of changing the name of the association.

(c) Damages

(d) Costs

(e) Further or other relief.

The material facts may be stated shortly. On 22 May 1986 an application had been purportedly made by the association to amend its name from "the Yee Chee Thor Seah Clan Association Penang," to "Malaysia Yee Chee Thor Seah Clan Association". This resulted in a meeting being convened on 14 August 1986, between the representatives of the association and one Encik Ng Kok Onn, the Pegawai Pendaftaran Pertubuhan attached to the Pejabat Pendaftaran, Pulau Pinang, acting in his capacity as representative of the Registrar. At this meeting, certain amendments to the application were made by Encik Ng, one of which was with regard to the name of the association so as to read "Persekutuan Keturunan Yee Chee Thor Seah, Malaysia" ("The Yee Chee Thor Clan Association, Malaysia)" to reflect its name in Bahasa Malaysia.

Mr. Ng in his affidavit affirmed to on 10 November 1988 (encl. 45) setting out the above facts categorically denied a suggestion by the defendants that the amendment was made because there was another association in Klang, Selangor bearing the same name. In particular, he denied the defendants' version that he had given this as the reason for making the amendment or that he had stated that unless the amendments proposed by him were made the Registrar's approval for the change of name would not be given.

Mr. Ng finally added that his department had approved the present name of the association, in the belief, that the amended minutes submitted by the defendants on behalf of the association were true.

In order to understand this concluding statement in Mr. Ng's affidavit and its relevance to the present application it is necessary to refer to the affidavit of the plaintiff affirmed to on 19 May 1987 (encl. 2) on the basis of which the *ex parte* order was granted. For convenience, I now reproduce the material portions thereof; they are as follows:

> 3. I filed the writ of summons herein for the reasons that the defendants as public officers of the defendant association have, in breach of the terms of the constitution of the defendant association, misled the Registrar of Societies to change the name of the defendant association from Yee Chee Thor Seah Clan Association, Penang to Chee Thor Seah Clan Association, Malaysia without the approval by it's members at the general meeting which is strictly required under r. 17 of the said constitution. A copy of the said Constitution is annexed herewith and marked "TBH1".

4. The defendants, as public officers of the defendant association had fraudulently, mistakenly or otherwise submitted to the Registrar of Societies a wrongful record of the minutes of the general meeting of the defendant association which was held on 16 February 1986. A copy of the said minutes which were executed by the defendants is annexed herewith and marked "TBH2".

5. In fact, the correct version of the minutes of the said AGM has been printed in Chinese by the defendant association which was widely circulated among the members. A copy of the said minutes in Chinese is annexed herewith and marked "TBH3A" together with it's English translation annexed herewith and marked "TBH3B".

6. On 4 May 1987, I have instructed my former solicitors, M/s. Ang Tan & Co. to write a letter to the Registrar of Societies informing him of the misleading acts of the defendants and requesting the said Registrar to cause investigations into the said matter.

7. On 13 May 1987, I had made a police report regarding the said acts of the defendants. A copy of the said police report is annexed herewith and marked "TBH4".

8. I am aware that the defendants are trying to either ratify the change of name of the defendant association to Yee Chee Thor Seah Clan Association, Malaysia by recruiting members of Yee's Clan (i.e., those with the surnames of Yee) or by disqualifying existing members of Chee, Thor and Seah Clans (i.e., those with surnames of Chee Thor and Seah) through the non-collection of their monthly membership subscriptions. By doing so, the defendants are, in fact, high-handedly creating a majority for themselves with the intention of calling for an extraordinary general meeting to endorse their misdeeds as above stated.

9. Many of the members of Chee, Thor and Seah Clans have confirmed that the defendant association, it's servants or agents have ceased to collect the monthly subscriptions from them.

10. I have received a notice from the defendant association issued by both the 1st and 2nd defendants as public officers of the defendant association, notifying me that an extraordinary general meeting will be held on 24 May 1987, to resolve, *inter alia*, to receive and adopt the change of name of the defendant association to Yee Chee Thor Seah Clan Association, Malaysia. An original copy of the said notice in Chinese is annexed herewith and marked "TBH5A" together with it's English translation annexed herewith and marked "TBH5B".

11. In view of the fact that the defendants have abused their power and manipulated the matters, attempted to continue to abuse and manipulate same as alleged above, I hereby pray for order in terms of my application.

By their joint affidavit filed in support of the application for discharge of the *ex parte* order affirmed to on 6 June 1987 (encl. 9) the defendants denied the allegations of fraud and high handed behaviour as aforesaid and went on to refer to various events which they said went to show that the change of name had been strictly in accordance with the Societies Act 1949, and the regulations thereunder. It was further alleged that there had been non-disclosure of material facts on the part of the plaintiffs when applying for the *ex parte* order and that the balance of convenience favoured the defendants rather than the plaintiff.

In his written submission, Counsel for the defendants had relied on the same points made in the defendants' affidavit and also on two other objections in law; namely, firstly, that the plaintiff's remedies (if any) lay exclusively under s. 18 of the Societies Act, if they

were dissatisfied with any decision of the Registrar and secondly, in any event, the rule in *Rigby v. Connol* [1874-80] AER Rep 592, that no Court had jurisdiction to decide upon the rights of persons to associate together when the association possesses no property, applied and so precluded me from entertaining the plaintiff's claims.

I propose to consider each of the points concerned in the same order in which they were argued before me.

On the question whether there are serious questions to be tried in regard to the association's purported change of name, I have kept in the forefront of my mind the guidance given by Lord Diplock in *American Cyanamid Co. v. Ethicon Ltd.* [1975] 2 AC 396. Applying this test, I am more than satisfied having regard to the lengthy rival affidavits put in by the parties not forgetting the affidavit of Mr. Ng aforesaid that there are serious questions to be tried.

On the question whether damages would be an adequate remedy, I must point out that the basic object for which most clubs are formed is the enjoyment of social intercourse. The most famous and many of the humblest clubs have this for their aim. But in addition there is also very frequently in view the promotion of some aspects of politics, of sport or of art or of some common interest among the members such as science or literature. These benefits or advantages which members enjoy are difficult if not impossible to quantify in terms of money or money's worth.

As for the second part of the *ex parte* order, having found that there are serious questions to be tried, I think it follows that preservation of the documents referred to therein is a necessary step in the interests of justice.

The plaintiff has alleged that the object of the defendants' exercise in changing the name of the association was to create a sizable majority in their favour through their disqualification of certain existing members and through recruitment of certain new members. Whether or not this is true, it is impossible for me to determine, upon affidavit evidence, but if the plaintiff is correct, the exercise could result in the deprivation of membership in the case of some individuals. In the circumstances, I am of the opinion that damages would not be an adequate remedy and so it is unnecessary to consider where the balance of convenience lies.

But, had it been necessary to do so, I am of the opinion it favours the plaintiff rather than the defendants. It was alleged by the plaintiff, and not challenged by the defendants, that the association still operated smoothly and there has been no interference with its day to day operations notwithstanding the *ex parte* order whose main effect has been to prevent the defendants from holding the extraordinary general meeting to effect the change of name.

On the question of alleged non-disclosure of material facts, the defendants alleged that the plaintiff had failed to disclose the following facts:

(i) the 1987 annual general meeting (AGM) i.e., to ratify name change. See para. 11 - Exhibit "OEG-YAC8" of defendants' affidavit in Court (encl. 9).

(ii) Requisition notice by the plaintiff and 4 others for extraordinary general meeting (EGM). (See para. 13 - Exhibit "OEG-YAC10" of Court encl. 8).

(iii) Round table conference meeting in April 1987 between the plaintiff and the defendants and representatives of the various members of the different surnames to find some consensus and at which it was agreed to leave the dispute to the EGM on 24 May 1987 for resolution. (See para. 16 and Exhibit "OCG-YAC16" of Court encl. 9).

(iv) the 1987 AGM at which it had been agreed to put the issue for EGM of 24 May 1987 for resolution. (See para. 16 and Exhibit "OCG-YAC16" of Court encl. 9.)

In reply, Counsel for the plaintiff submitted (and I extract this from his written submission) as follows:

> On (i) above, though one item of the agenda then was to rectify the resolution passed by the committee to change the name, the participants felt that the name had already been changed mysteriously. In fact, the meeting agreed that the said resolution of the committee be reserved for discussion at an EGM (see encl. 9 Exhibit "OCG-YAC9".)
>
> On (ii) above, the requisition notice by the plaintiff and four (4) others for an EGM had been submitted to the committee without knowledge that there were false minutes submitted by the defendants which caused the change of name.
>
> On (iii) above, the said round table conference was actually held to find out why the name of the association was changed without a resolution from the AGM. There was no decision to hold an EGM and what the first defendant had disclosed to the press was not true.
>
> On (iv) above, the 1987 AGM only resolved that the committees' resolution to change the name "be reserved for discussion at an EGM". (Emphasis added. See encl. 9 paras. 12 and 8, and OEG-YAC9, para. 8 of the same enclosure). There was no decision to create an item of the agenda to rectify the change of name.

I have already said, and I would repeat, I cannot at this stage rule on the question of the legality or the propriety of the change of name of the association for this must await the final hearing. Subject to this important qualification, I agree with Counsel for the plaintiff that the principle enunciated by Hashim Yeop A Sani J (as he then was) in *Professor A. Kahar Bador & Ors. v. N. Krishnan* [1983] 1 MLJ 407 that where it has not been shown that the misrepresentation or suppression was of such a nature as to mislead the Court or if the truth was presented, the Court would probably have not granted the *ex parte* order, the application for discharge should be refused, applies in the present case.

Next, I do not consider that the jurisdiction of this Court is ousted under the principles enunciated in *Rigby v. Connol* (*ibid*). The plaintiffs obviously do own property, for otherwise they could not possibly function as such. They have their own premises and no doubt have furniture there for the use of its members and I note from the minutes of its AGM held on 8 February 1987 (Ex. YAC8 to enclosure in the defendants' joint affidavit) that a copy of its treasurer's report including a profit and loss account for 1986 had been submitted. These minutes also show that a sum of RM1,284.10 had been incurred for repairs to the roof of the association's premises.

In *re St James' Club* [1852] 2 De GM & G 383 St Leonards LC considered the nature and constitution of a members' club and the interests and liabilities of its members. He said that a member had an interest in the general assets as long as he remained a member

and if the club was broken up whilst he is a member, he would be entitled to the furniture and effects of the club. But he had no transmissible interest, not an interest in the ordinary sense of the term capital in partnership transactions. He had a simple right of admission to, and enjoyment of, the club while it continued.

It is, as I have said, implicit in the plaintiff's claims that the intent and effect of the defendants' exercise in changing the name of the association, is to deprive certain members thereof of their membership contrary to the rules of the association. If this is so, then clearly property rights would be involved for the reasons stated and so the point as to jurisdiction based on the case of *Rigby v. Connol* (*ibid*) has no substance.

It was lastly submitted by Counsel for the defendants that if the plaintiff was dissatisfied with the decision of the Registrar approving the change of name their remedy was to appeal against it in accordance with s. 18 of the Societies Act 1949.

I note, however, that the provision relied on by Counsel for the defendants, being s. 18(d), speaks about an appeal lying against "the **refusal to approve** the change of name etc." (Emphasis added.) There is no provision for appeal from the decision of the Registrar **approving the change** of name which is what happened in the instant case. It is, of course, fundamental that the right of appeal is a creature of statue. On this ground alone I would dismiss this objection by Counsel for the defendants. But, there is a further ground why this objection cannot succeed. If, as the plaintiff contends the Registrar's approval was obtained on the faith of forged minutes embodying a resolution of the association submitted fraudulently, then the decision based thereon would, in effect, be a nullity, in which case the plaintiff is not bound to resort to the remedy of appeal but may instead have recourse to collateral proceedings to attack the decision.

In *Harkness v. Bel's Asbestos and Engineering Ltd.* [1967] 2 QB 729, 736 Lord Diplock stated the general rule at p. 736, thus:

> It has long been laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the Court and asking for it to be set aside.

This general rule was cited with approval by Abdoolcader J when speaking for the Federal Court in *Eu Finance Bhd. v. Lim Yoke Foo* [1982] 2 MLJ 37 at p. 39 and he added:

> where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be attacked in collateral proceedings, before any Court or tribunal and whenever it is relied upon - in other words it is subject to collateral attack. In collateral proceedings the Court may declare an act that purports to bind to be non-existent.

And, in the next paragraph, he dealt with the failure to take advantage of the remedy of appeal where the impugned order is a nullity in the following words:

> Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void'. (*Birmingham (Churchwardens and Overseers) v. Shaw* [1849] 10 QB 868, 880;116 ER 329 (at p. 880 per Denman CJ).

In the result, having regard to the interests of all parties concerned and how best they may be protected, always keeping in mind the foreseeable positions at the trial, considerations of hardship, inconvenience in the meantime and other relevant discretionary factors, the application was dismissed with costs and an early trial ordered.

Also found at [1990] 1 CLJ 161